97-1049

No.

Supreme Court, U.S.
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In The

# Supreme Court of The United States

October Term, 1997

JOHN LYNN, individually and as a Town of Clarkstown Police Officer, and DANIEL WEISBERG, individually and as a Town of Clarkstown Police Officer,

*Petitioners,*

- against -

ERNESTO MURPHY,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## REPLY BRIEF

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8 pp

## QUESTION PRESENTED

Whether a criminal defendant who is released on his own recognizance is seized for so long as state charges are pending and thereby can maintain a section 1983 malicious prosecution claim under the Fourth Amendment?

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## REASONS FOR GRANTING WRIT

### I.

### THE LOWER COURT'S OPINION DOES IN FACT CONFLICT WITH OTHER CIRCUITS REGARDING WHAT CONSTITUTES A SEIZURE FOR FOURTH AMENDMENT PURPOSES.

The decision below is clearly in direct conflict with rulings in other Circuits which have explicitly rejected and questioned the theory that a criminal defendant is seized for so long as charges are pending. *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir.1997); *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996). There is no question but that the definition of what constitutes a "seizure" for Fourth Amendment purposes set forth by the Court below is contrary to the definition set forth in the Fourth, Seventh and Eleventh Circuits.

The Court below has effectively adopted the view that the pendency of a criminal proceeding alone is sufficient to constitute a "seizure" for Fourth Amendment purposes and thereby can form the basis for a sec. 1983 malicious prosecution claim. The Fourth and Seventh Circuits have explicitly determined that the pendency of criminal proceedings does not, in-and-of-itself, constitute a "seizure" for Fourth Amendment purposes. *Riley*, 115 F.3d at 1162; *Reed*, 77 F.3d at 1052 n.3. The Eleventh Circuit has also seriously questioned whether the pendency of criminal proceedings constitutes a "seizure." *Whiting*, 85 F.3d at 584. As a

result, the protection afforded by the Fourth Amendment will be unequal for criminal defendants in the Second Circuit as compared to defendants in other Circuits. While a criminal defendant released on his own recognizance in the Second Circuit will be considered "seized" for Fourth Amendment purposes, a defendant released on his own recognizance in other Circuits will not be deemed "seized". Such conflicting application of the Fourth Amendment clearly will result in the existence of inequitable and disparate treatment of individuals in the different Circuits. Respondent is incorrect in asserting that no conflict between Circuits exist.

Due to the conflict among Circuits on what constitutes a "seizure" under the Fourth Amendment for sec. 1983 purposes, clarification is required by this Court. Absent clarification, Fourth Amendment rights of defendants will be unequal between Circuits, which will result in disparate and unequal treatment of individuals depending solely on what Circuit they happen to be in.

## II.

**THE LOWER COURT INCORRECTLY DETERMINED THAT THE FOURTH AMENDMENT WAS IMPLICATED BASED ON RESPONDENT'S RIGHT TO TRAVEL BEING RESTRICTED.**

In *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), this Court made clear that in order to prevail on a malicious prosecution claim under section 1983, a plaintiff must show a

violation of his rights under the Fourth Amendment.

The Court below determined that a restriction on respondent's right to travel implicated the Fourth Amendment. However, as conceded by the lower court, the roots of the right to travel have never been identified with particularity and have never been localized in the Fourth Amendment itself. The lower court's ruling is therefore contrary to the holding in *Albright* because respondent was allowed to prevail even though no established Fourth Amendment rights were implicated. Instead, a violation of respondent's right to travel, a right not having its roots in the Fourth Amendment, was held to be sufficient to form the basis for respondent's malicious prosecution claim under sec. 1983.

Contrary to respondent's contention, it is clear that the lower court determined that respondent had a viable sec. 1983 action based on his right to travel being restricted.

Clarification is required by this Court to determine whether the violation of an individual's right to travel is sufficient to prevail on a section 1983 claim subsequent to *Albright*, where the roots of the right to travel have never been localized in the Fourth Amendment.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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